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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1642

WILLIAM T. FARR,
Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND JUDICIAL DISTRICT, DIVISION ONE

BRIEF FOR RESPONDENT IN OPPOSITION

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REFERENCES

The respondent's references to the proceedings in the court below are made by citation to Appendixes "A" through "C" to the petition herein.

QUESTIONS PRESENTED

1. Is a former newsman's constitutional right of freedom of speech and press abridged by requiring him to appear before a judge of the Superior Court of the State of California and answer relevant ques-

tions concerning the identity of certain persons he observed violating a court publicity order; can the mandate of the United States Supreme Court in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600 be negated by protecting under a claim of First Amendment rights a reporter's refusal to reveal observed violators of a publicity order?

2. Is a trial judge under the decision of *Mayberry v. Pennsylvania,* 400 U.S. 212, disqualified from adjudicating the contempt of a witness before him who wilfully refuses to answer relevant questions?

The petitioner has also challenged the constitutionality of the trial court's Order Re Publicity that was issued pursuant to this court's compelling directive in *Sheppard v. Maxwell, supra.* Petitioner claims that such an order, issued in the course of one of the most notorious and widely reported murder trials of recent times and applicable only to attorneys, parties and court attaches, violated the First Amendment to the U.S. Constitution. Respondent respectfully submits that the validity of the court's publicity order is not an appropriate issue before this court as that order was not applicable to the petitioner, nor was it challenged by any of the parties subject to its provisions. Indeed, the petitioner himself did not raise this constitutional issue in the California Court of Appeal.

STATEMENT OF THE CASE

The petitioner by his conduct during the trial of *People v. Manson, et al.,* and his refusal to testify during the court's subsequent inquiry has hurled a deliberate challenge to effective enforcement of this court's mandate in *Sheppard v. Maxwell.* The viability of that mandate will rest on whether the decision of the California Court of Appeal is upheld.

The issues in the instant case arose out of one of the most bizarre and sensational murder cases of recent years—the case of *People of the State of California v. Charles Manson.* The case received intense and broad coverage by the news media from the moment the bodies of actress Sharon Tate and her friends were discovered. The publicity surrounding the case did not abate when Charles Manson and several of his associates were arrested and charged with those murders as well as those of Mr. and Mrs. La Bianca. The intensity of the news coverage increased to such an extent as the pre-trial and trial proceedings began to run their course that the trial of Charles Manson and several members of his "family" became one of the most publicized murder trials in the history of California.

The petitioner seeks a Writ of Certiorari to review a decision of the California Court of Appeal affirming a judgment of contempt against the petitioner for his wilful refusal to answer certain material and relevant questions of the trial court. These questions

sought to elicit the identity of certain persons, admittedly known by the petitioner, who had wilfully violated the court's Order Re Publicity issued in the *Manson* case.

The resolution of the issues in this case will have a direct, immediate and vital effect on the ability of the trial courts of this nation to assure a criminal defendant a fair trial, free from prejudicial newspaper publicity, in compliance with mandate of the U.S. Supreme Court expressed in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600.

The issues decided by the California Court of Appeals involved not only an interpretation and application of a state newsman's testimonial immunity statute but also the question of whether the petitioner was privileged under the First Amedment of the U.S. Constitution to refuse to answer the questions put to him by the trial court. Most significantly, the case was the first in this county that dealt with the extent to which a reporter could use a state immunity statute as an instrument to interfere with the due administration of justice and to frustrate the inherent authority of trial courts to enforce their orders designed to guarantee criminal defendants a fair trial.

William T. Farr, the petitioner herein, sought to use the California Newsmen's Immunity Statute (Calif. Evid. Code §1070) and the First Amendment of the U.S. Constitution, as a protective umbrella under which to operate in the facilation and encourage-

ment of several flagrant breaches of the trial court's lawful publicity order. The California Court of Appeal correctly determined that under those circumstances the application of a state immunity statute to immunize the petitioner from contempt for refusing to reveal the identity of persons violating the court's order would unconstitutionally interfere with the inherent powers and duties of the court.

That court's decision that the California immunity statute violated the State Constitution is an authoritative determination of that point. The U.S. Supreme Court in *Bridges v. Superior Court,* 314 U.S. 252 [86 L. Ed. 192] previously recognized the finality of a California appellate court's determination of the constitutionality of their state immunity statutes. The only constitutional issue, therefore, properly raised before this court is the question of whether the petitioner's rights under the First Amendment of the U.S. Constitution have been abridged. The respondent submits that this constitutional question was resolved by your Honorable Court in the most recent cases of *Branzburg v. Hayes, In Re Pappas,* and *United States v. Caldwell* (1972) 406 U.S. ..... , 33 L. Ed. 2d 626, 92 S. Ct. .....

STATEMENT OF FACTS

The respondent concurs with Petitioner's Statement of Facts to the extent that they are set forth. His Statement of Facts, however, does not reveal the nature of petitioner's complicity in the several violations of the court's publicity order.

The facts of this case reveal a concerted, knowledgable and deliberate attempt by one member of the news media to obtain and publish information prejudicial to a criminal defendant in a manner that ultimately resulted in flagrant violations of a lawful court publicity order. This activity was coupled with a deliberate attempt by the petitioner to conceal and protect the violators' identity behind an assertion of First Amendment privileges.

Early in the court's inquiry the petitioner admitted by way of a Declaration that he had obtained copies of the transcript of a potential prosecution witnesse's testimony from certain attorneys in exchange for his explicit promise to conceal their identities. In making these promises Farr stated that he relied upon the California Newsman's Immunity Statute, California Evidence Code §1070. (Appendix C., page 169).

Farr did not object to being called as a witness and, indeed voluntarily testified to many facts which exposed for the first time the extent of his participation and, in fact, assistance in the violation of the Court's Order Re Publicity. For instance, he admitted that he had made the initial contact with the parties and had solicited from them copies of the statement of the prosecution witness (Appendix B, pages 124-125). He also admitted that he had promised each of the parties explicitly that he would conceal their identity knowing that at the time he made the promises that they were parties subject to the Court's Order Re Publicity. (Ap-

pendix B, page 122) It was also revealed that he had taken the original transcripts of the witnesse's statement that had been distributed to the attorneys, made copies thereof and returned the originals to the attorneys so that their absence would not be noted. (Appendix B, pages 12d, 148)

As a consequence of his reportorial assignment the petitioner was familiar with the Order Re Publicity and the parties to whom it applied. At the time Mr. Farr wrote the article and at the time that it was published he was aware that the article contained much information that would not be admissible in the trial of the defendants. In fact, the article expressly stated that the testimony of Miss Graham at the current trial of Charles Manson, et al., would not include the matters related in the article (Exhibit "A"). When the copies of the statement were released to the attorneys of record, the admissibility of the statements therein had not been determined by the court.

At no time during the proceedings below did the petitioner claim a privilege under the Fifth Amendment to the United States Constitution.

REASONS FOR DENYING THE PETITION

The Larger Problem

A substantial and disturbing problem existing unresolved since the opinion of this Supreme Court in *Sheppard v. Maxwell,* and posing a substantial threat to effective compliance with the Court's directive in

that case, has at last manifested itself. This is the problem of enforcing valid court publicity orders issued in compliance with *Sheppard* when counsel and members of the press collaborate and the reporter refuses to reveal the identity of the party violating the court order. In such circumstances not only is the violator protected but dissemination of the prejudicial publicity is encouraged and placed beyond the authority of the trial court to curtail. Such potential for abuse cannot be countenanced.

Your Honorable Court in *Sheppard,* in unequivocal terms, mandated the trial courts of this country to take effective action at the outset of a criminal trial to insure the accused a fair hearing untainted by prejudicial newspaper publicity. In language that could not be more express or urgent it was stated that under appropriate circumstances the trial judge should make orders proscribing extrajudicial statements concerning a pending criminal case by lawyers, parties, witnesses, and court officials. Failure to take such protective measures could be construed as effectively denying the accused a fair trial, requiring a reversal of the conviction.

This Court's concern with the prevention of prejudicial extrajudicial statements was again expressed most recently by the majority opinion in *Branzburg v. Hayes,* where at 33 L. Ed. 2d 626, 642, the *Sheppard* case was cited as authority for the issuance of trial court orders proscribing extrajudicial statements

by attorneys, witnesses, and court officials. In addition, the Court commented that where necessary to assure a defendant a fair trial, newsmen "may be prohibited from attending or publishing information about trials."

Although the opinions of this court in *Sheppard v. Maxwell* and *Branzburg v. Hayes* indicate that in appropriate circumstance direct restraints on publication might be imposed upon the press, the constitutional validity of such action has not, as of yet, been directly determined. Thus, once the information has been acquired by the press it remains questionable that publication of that information, no matter how potentially prejudicial to the conduct of a fair trial, could be foreclosed. The crux of the problem is the existence of this hiatus between the court's duty to restrict extra judicial statements by officers of the court and its apparent lack of direct authority over the news media once the prejudicial information is in their possession. How can the court fulfill its duty to provide a fair trial unless effective enforcement of its valid orders governing the conduct of its own officers is assured?

The facts of the instant case portray accurately the gravity of this problem, particularly when counsel and reporters collaborate. If a reporter can claim an immunity from the requirement of all citizens to testify, the courts are rendered powerless to perform the duties required of them by the United States Supreme Court. When the parties enjoined by a trial court's publicity

order can shield themselves from discovery and corrective action by merely giving the extrajudicial statements to members of the news media, the ability of the trial court to protect the accused from the prejudicial effect of such statements is reduced to nothing more than the issuance of impotent admonishments. When a reporter can not only hide behind an alleged reporters "privilege" to the frustration of a court's legitimate and compelling duty but can also rely upon such a "privilege" to obtain the extrajudicial statements in the first instance, the trial court's continuing viability as the protector of a defendant's constitutional right to a fair trial is in serious jeopardy.

ARGUMENT

I

THE SUPERIOR COURT'S INQUIRY AND SUBSEQUENT ADJUDICATION OF CONTEMPT IS NOT AN UNCONSTITUTIONAL ABUSE OF THE COURT'S POWER NOR AN HARASSMENT OF THE PETITIONER.

The respondent Superior Court's judicial inquiry into this matter cannot conceivably be considered harassment. Its actions were compelled if the court was to fulfill its obligations and protect the rights of the parties before it.

The record is clear that the court was solely interested in determining the identity of the violators of the publicity order and did not wish to unnecessarily

interfere with the activities of the press. (Appendix B, Page 31) The court exhausted all reasonable alternative means of obtaining the necessary information before ordering the petitioner to answer the questions. The court summoned all of the attorneys participating in the *Manson* trial and asked each of them if they had given the petitioner the statement of Virginia Graham. All of the attorneys denied giving Mr. Farr the transcript; thus, the initial insult to justice was compounded by the presence of perjury. (Appendix B, Pages 62 & 108)

The court, of course, imposed no direct restrictions on the publication of any article by the petitioner.

The proceedings held in the court's chambers on October 1, 1970 were informal in nature, no one was under oath, and the transcript clearly indicates that the court was primarily concerned with preventing any prejudice to the defendants that might be caused by the publication of the article by Mr. Farr.

The court necessarily had to question Mr. Farr if the identity of the violators were to be ascertained. The court, of course, could not take any action against the parties subject to the order until the violator became known and the reason that they have remained unknown is because Farr has refused to reveal their identity.

The United States Supreme Court has, on numerous occasions, emphasized the necessity of preserving in the trial courts the necessary authority to ef-

fectively carry out their functions as viable members of the tripartite form of U.S. government. The vulnerability of the judicial branch to efforts which impair its ability to preserve constitutional guarantees is revealed constantly but perhaps never more apparently than in this case. The facts of this case clearly indicate the disturbing and serious challenge to the trial court's ability to insulate a criminal defendant from the type of prejudicial publicity so strongly decried by your court. The dilemma of the trial court is self evident. On the one hand it must take effective action at the trial level to restrain extrajudicial statements by counsel and other officials. On the other hand if a reporter may freely operate behind a source privilege, the court is constrained to sit idly by while collaboration between counsel and reporter erode the defendant's right to a fair trial. The recognition of a reporter's source privilege to shield violators of lawful court orders effectively creates an impenetrable conduit through which this prejudicial information may flow unrestricted.

Your honorable Court has indicated that it will not permit this circumstance to prevail unremedied. This Court has, many times, expressed its recognition that the guarantee of a fair trial requires more than mere lip service. Effective enforcement of constitutional guarantees requires effective authority in the trial courts. Thus the Court has stated:

> "We start with the premise that the right of courts to conduct their business in an untrammeled

> way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions." (*Sheppard v. Maxwell, supra* at page 383)

and similarily in the earlier case of *Pennekamp v. Florida,* 328 U.S. 331, 347, 90 L. Ed. 1295, 1303, the Court observed that "Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action."

II

REQUIRING TESTIMONY OF A REPORTER CONCERNING THE SOURCE OF INFORMATION HE RECEIVED IN VIOLATION OF A COURT PUBLICITY ORDER DOES NOT ABRIDGE FIRST AMENDMENT RIGHTS.

The initial question presented to this Court that the petitioner's First Amendment Rights have been abridged was answered by the opinion of the court in *Branzburg v. Hayes* (1972) 406 U.S. ....., 33 L. Ed. 2d 626, 92 S. Ct. .....

The petitioner and amici's interpretation of the California law established by the opinion of the California Court of Appeal, in *Farr v. Superior Court* (1971) 22 Cal. App. 2d 60, 99 C. Rptr. 342, is not only inaccurate but irrelevant to any federal issue on petition for writ of certiorari.

The petitioner and amici construction of the scope of the decision of the Court of Appeal is theirs alone and does not represent a reasoned analysis of the effect of the appellate court's ruling. The court's ruling must be construed only within the narrow facts of this particular case as the opinion of the court expressly stated. The conclusion that California Evidence Code §1070 would be unconstitutional if applied to immunize the petitioner was, in the opinion of the appellate court, compelled because of the mandate of the United States Supreme Court in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600.

There exists no language in the Court of Appeal's opinion to even suggest that the rule stated therein was applicable to all investigations of an alleged violation of a court order. The Court order in this particular case was issued to protect a criminal defendant's Sixth Amendment rights, a constitutional right of paramount importance in this county and a circumstance that is not present in situations where other testimonial privileges may be asserted.

In any event, a decision of a state appellate court on the constitutionality of a state immunity statute under its own state constitution is not a determination reviewable by the federal Supreme Court. *Bridges v. Superior Court,* 314, U.S. 252, 86 L. Ed. 192.[1]

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[1]The United States Supreme Court in *Bridges v. Superior Court,* 314 U.S. 252 [86 L.Ed. 1921], reversed the decision of the California Supreme Court, but it was on the ground that the constitutional guarantee of free speech protected the publication of the particular newspaper article that was the basis of the contempt citation. (Bridges had been held in contempt for publishing an article that allegedly attempted to influence the decision of the

Moreover, state contempt immunity statutes have been held unconstitutional by state courts on numerous occasions. *In Re San Francisco Chronicle* (1934) 1 Cal. 2d 630, 634; 36 P. 2d 369; *Bridges v. Superior Court* (1939) 14 Cal. 2d 464, 479; 94 P. 2d 983; *Burns v. Superior Court* (1903) 140 Cal. 1; 73 P. 597; *Atlanta Newspapers, Inc. v. State of Georgia* (1960) 116 SE 2d 588.

The claim made by newsmen in recent years to a constitutional privilege not to be compelled to reveal sources of information was finally resolved by this Court in *Branzburg v. Hayes, supra,* wherein this Court held that a reporter's freedom of speech and press was not abridged by requiring him to appear and testify before a grand jury. The *Branzburg* opinion is determinative of this issue before the Court. Respondent urges, however, that even if the opinion of the Court in *Branzburg* had been otherwise, to compel the petitioner herein to testify under the particular circumstances of the instant case and this Court's opinion in *Sheppard v. Maxwell,* does not constitute an abridgement of his First Amendment rights.

In *Branzburg* the reporter was held to be required to appear and testify before a grand jury, the Court being of the opinion that the overwhelming interest of the public in the investigation of crimes by grand juries

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court.) The principle that the legislature cannot infringe upon the inherent power of the courts to punish for contempts was not affected. The Supreme Court noted at page 261 of their opinion,

> "California Supreme Court's decision that the statute is invalid is an authoritative determination of that point."

outweighed any indirect, consequential and uncertain burden on newsgathering activities. In the instant case the reporter's testimony was sought in a court of law and only after it had been clearly established (by the reporter's own statements) that he knew the identity of the attorneys violating the court's publicity order. In addition, this case was directly concerned with the protection of another constitutional amendment of great importance in a free society, —the Sixth Amendment which guarantees a criminal defendant a fair trial before an impartial jury. The concurrent accommodation and protection of Sixth Amendment rights was not a factor in the *Branzburg, Pappas and Caldwell* cases.

The distinction, for First Amendment analysis, between a grand jury proceeding and a criminal trial was previously noted by this Court when in *Wood v. Georgia* (1962) 370 U.S. 375, 8 L. Ed. 2d 569, the majority observed:

> "First, it is important to emphasize that the case does not represent a situation where an individual is on trial; there was no 'judicial proceeding pending,' in a sense that prejudice might result to one litigant or the other by ill considered conduct aimed at influencing the outcome of a trial or a grand jury proceeding . . . *and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation.*" (Emphasis added) *Wood v. Georgia,* 8 L. Ed. 2d at page 580

The majority opinion in *Branzburg* emphasized that grand jury proceedings were constitutionally mandated and had formed for centuries an indispensible part of our judicial system. Not to be overlooked, therefore, in the instant case, is a mandate of equal importance and significance. This is the mandate of this Court that it is the trial court's duty to provide a forum where a criminal defendant could obtain a fair trial, free from prejudicial out-of-court statements and that to fulfill that duty the court could and should issue appropriate publicity orders. Thus, an even more compelling reason for requiring the petitioner's testimony is present herein.

The danger to the administration of justice that recognition of a newsman's privilege would entail was commented upon in the majority opinion in *Branzburg*. All those potential evils are present in the case at bar plus the very real threat to Sixth Amendment rights. Factually and legally there exists no valid reason why the rule stated in *Branzburg* should not obtain in this case.

The petitioner collaborated with and, of course, observed each of the attorneys acting in violation of the court order. The following comment of this court in *Branzburg,* 33 L. Ed. 2d, at page 646, is therefore particularly in point.

> "Thus, we cannot seriously entertain the motion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory

that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."

It is likewise significant to note that this case does not involve any possible invasion of the expression of political and idealogical beliefs. The scope of inquiry in the proceedings below were much more narrow and relevant than was the situation in *Branzburg, Pappas* and *Caldwell*. The petitioner's own admissions established that the violators of the publicity order were all within a small defined group of individuals. Moreover, unlike the reporters in *Caldwell* and *Pappas*, the petitioner herein did not object on constitutional grounds to the court's summoning him to testify and, indeed, furnished without objection much information that clearly indicated the propriety of further inquiry by the court.

It should not be overlooked that even when the standards articulated by Mr. Justice Stewart in his dissent in *Branzburg* are applied to the facts herein, the action of the respondent court did not constitute an unconstitutional impingement of First Amendment rights. The information sought was clearly relevant to a precisely defined subject of judicial inquiry, could not have been obtained by alternative means, and cer-

tainly the protection of Sixth Amendment rights and effective compliance with a constitutional mandate of the United States Supreme Court is a matter of grave national concern.

Under the narrow ruling of the California Court of Appeal herein no long-range crippling effect on legitimate news-gathering activities can reasonably be perceived. Newsmen are quick to point out that the public benefits from the recognition of newsmen-informant privileges because they serve to encourage and facilitate the dissemination of news. The type of news, it is claimed, that is necessary for the maintenance of a well-informed society. One cannot doubt the merit of these observations when applied to the appropriate fact situation, but when considered within the context of the predominant issues of this case that argument clearly strays from the path of logic. Their argument in this regard, however, serves to emphasize the justification for the issuance and enforcement of publicity orders because these orders are designed to protect a criminal defendant's Sixth Amendment rights by temporarily curtailing the dissemination of certain types of information. *If the recognition of a privilege in this case will serve to expedite the dissemination of information the Order Re Publicity was intended to curtail, how can it then be seriously argued that the mandate of the Supreme Court is not being frustrated. Your honorable Court has declared that the Sixth Amendment requires that prejudicial publicity be restricted, not encouraged. No valid public purpose is*

promoted by broadcasting, while the trial is in progress, the type of information that was related in the petitioner's newspaper article.

III

THE ORDER RE PUBLICITY WAS NOT VOID AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON FIRST AMENDMENT RIGHTS; THE PETITIONER HAS NO STANDING TO CHALLENGE THE VALIDITY OF THE ORDER RE PUBLICITY.

A. The Order Re Publicity Was Constitutionally Valid.

Just as the recent opinion of this Court in *Branzburg* resolves the issue of a newsman's source privilege, the opinion of the court in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600, disposes of petitioner's contention that the respondent's publicity order was void as a prior restraint on freedom of speech. It is interesting to observe, that although the opinion in *Sheppard* is the most significant expression by this Court pertaining to a trial court's obligation to protect the right to a fair trial by controlling extrajudicial statements by officers of the court, the petitioner and amici choose to completely ignore its existence. The Supreme Court's directive in *Sheppard,* however, was not ignored by the respondent court and it is hoped, is not being ignored by the other criminal courts of this nation.

Since the mandate of the Supreme Court in *Sheppard,* the constitutionality of publicity orders similar to the one issued in the *Manson* case have been upheld many times by state and federal courts. It has also been established, contrary to the assertions of the petitioner that the clear and present danger test does not apply to publicity orders intended to limit extrajudicial statements by counsel and other officers of the court. Recently, in *U.S. v. Tijerina* (10 Cir. 1969) 412 F. 2d 661, cert. den. 396 U.S. 990, 24 L. Ed. 2d 412, the court held that such an order would be justified if there existed a "reasonable likelihood" that prejudicial news would tend to prevent a fair trial.

The court in *Tijerina* distinguished the *Bridges, Pennekamp, Craig* and *Wood* cases with the observation that none of them involved a contempt arising from the violation of a publicity order.

In any event, the pretrial publicity, (which included newspaper publication of a confession by defendant Susan Atkins that implicated all of the defendants), the brutal nature of the crimes, and the intense coverage by the press of the defendants and in the life style of the "family," created a climate in the *Manson* case that made it manifest that extrajudicial statements could present a clear and present danger to the administration of justice.

Rather than discuss or even cite *Sheppard v. Maxwell,* the petitioner quotes general constitutional principles that found their expression in cases totally dif-

ferent from the instant case and without any effort to relate them to the facts and to the dominant problem at bar—the balancing of a defendant's right to a fair trial guaranteed by the Sixth Amendment with the freedom of speech guarantees of the First Amendment. In balancing these interests of equal constitutional dignity the Supreme Court has always made sure that the balance was not struck against right to a fair trial, even when some restriction on speech activities would result. The cases cited by petitioner, *Bridges v. Superior Court, Pennekamp v. Florida, Craig v. Harney* and *Wood v. Georgia,* were all decided prior to *Sheppard v. Maxwell,* were not concerned with Sixth Amendment rights, and have all been distinguished by subsequent cases dealing with the problem of protecting by publicity orders the constitutional guarantee of a fair trial. In retrospect, it can now be seen that Mr. Justice Harlan's dissent in *Wood v. Georgia* and the comment in the majority opinion of that case that limitations on free speech assume a different proportion when a criminal trial is involved, furnished a clear indication of the rule ultimately to be fashioned by the Court in *Sheppard.*

The sequestration of the jury in no way affected the validity of the original Order Re Publicity. The opinion of the Supreme Court in *Sheppard implied* that the trial judge could, and indeed should, take cumulative measures if necessary to restrict the dissemination of prejudicial out of court statements. There was no suggestion in *Sheppard* that sequestration of

the jury would deprive the court of authority to take additional measures if the circumstances of the case would warrant it.

It is obvious that the more sensational and widely reported a criminal trial is, the more affirmative action the trial judge must take. Sequestration of the jury may in some cases be less than totally effective since there really cannot exist complete sequestration unless the jurors are made virtual prisoners in the courthouse. The *Manson* case itself illustrates that sequestration is not infallible. It is a matter of record in that case, of which the court may take judicial notice, that on numerous occasions during the trial it was necessary for the court to order blacked out the windows of the bus transporting the jurors from the courthouse to their hotel so that the jurors would not have the opportunity to observe the newspaper headlines commenting on the trial. In spite of such precautions, during the course of the trial a newspaper headline proclaiming President Nixon's comments on the case was exposed to the jury.

B. The Petitioner and Amici Have No Standing to Challenge the Validity of the Order Re Publicity.

The Order Re Publicity did not apply to the petitioner or to the news media in general—the order sought to regulate the extrajudicial statements of counsel, witnesses, court attaches and other persons under the direct control of the court. The news media could and did publish any article about the proceedings they

desired, no matter how potentially prejudicial it might be to the defendants.[2] Neither the defendants in the *Manson* case nor their attorneys challenged the order. Indeed, they appear to have welcomed the order as well as the sequestration of the jury.[3]

The petitioner made no claim that the order was constitutionally void at the hearings before Judge Older on June 3 or July 19, 1971, and none of the attorneys summoned to testify at the hearing on June 30 raised any issue as to its validity. The petitioner stipulated without qualification that the Order Re Publicity could be introduced into evidence in the hearing. (Appendix B, page 20).

Moreover, Farr in his petition for Writ of Review in the California Court of Appeal failed to contest the validity of the order. As neither the parties subject to the order, nor the petitioner himself, have previously questioned its legality, the petitioner and his amici are now making an improper collateral attack upon the validity of that order. Failure of a defendant *personally subject to a publicity order* to object to that order at the trial level has been held to

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[2]The trial court recognized that its publicity order did not bind the press. Judge Older as a concerned judicial officer, requested that Mr. Farr's newspaper voluntarily refrain from publishing the article relating the statements of Virginia Graham because of the prejudicial effect that it might have on the trial (R.T. 13,316 and 13,361, *People of the State of California v. Manson, et al* No. A253156). The article was nevertheless published the next day on the front page of the Herald-Examiner.

[3]During the *Manson* trial attorneys for some of the defendants made several motions requesting the interrogation of the jury for the purpose of ascertaining if they had been exposed to any prejudicial information in violation of the publicity order. Several of the attorneys also expressed alarm at the possible prejudice that might enure to their clients by the publication of the article by Farr, even to the extent of requesting that the court issue an order enjoining the Herald-Examiner from publishing the story (R.T. 13360 to 13373. *People of the State of California v. Manson, et al.* No. A253156).

preclude his challenging the validity of that order on appeal. (*People v. Watson* (1971) 15 C. A. 3rd 28, 42; 92 Cal. Rptr. 860.

The order is constitutionally valid on its face and the petitioner and his amici have no standing to now claim that it is void.

IV

PETITIONER'S CONTEMPT ADJUDICATION NOT INVALIDATED UNDER THE DOCTRINE OF *MAYBERRY v. PENNSYLVANIA*, 400 U.S. 455.

The argument that it was error for Judge Older to conduct the hearing is, in the opinion of the respondent, so devoid of merit as to require but summary comment.

The petitioner himself did not raise any objection to Judge Older presiding at the inquiry, either at the time of hearing or before the Court of Appeal. In fact, his counsel affirmatively stated that there would be no challenge to Judge Older (Appendix B, page 29). Only the amici raised the argument that Judge Older was disqualified, and then, only on appeal. The amici, of course, do not possess the same standing in the proceedings as the petitioner himself. If the petitioner has waived any objection that was required to be made at the trial level, the amici cannot resurrect this right on appeal.

The cases cited by the amici on this point are easily distinguishable on their facts. They all apply to be-

havioral offenses of a disruptive nature or acts constituting a vicious, slanderous, or personal vilification of the trial judge, occurring in his immediate presence. Also, in both cases there was an objection to the trial judge sitting, made by each defendant prior to the adjudication of contempt.

Even where the defendant's behaviour can be interpreted as an attack on trial judge it is not in every case that the judge is disqualified. As the Court observed in *Mayberry* at 400 U.S. 465, the attacks must be of a nature that they carry such potential for bias as to, in the interest of fairness, require the hearing be held before a disinterested judge. There is no indication in the opinions of *Mayberry v. Pennsylvania* and *Johnson v. Mississippi* that a court before whom a witness refuses to answer a proper question is there-upon disqualified from holding that person in contempt.

Judge Older during the hearings gave each party full and fair opportunity to argue their respective positions. The Judge gave Farr a complete warning after each refusal and afforded him another opportunity to answer the question. The petitioner's contempt in this case consists solely of his refusal to answer proper, relevant questions when ordered to do so by the court. Referral of the matter to another judge could in no way affect the adjudication of contempt. A wilful refusal to testify constitutes a contempt in any court.

Farr himself, of course, was not on trial. Farr was summoned before court solely as a witness. No con-

tempt action was initiated or contemplated until Farr refused to answer the questions.

The protestations in both petitioner and amici briefs that Judge Older was in effect the prosecutor, complaining witness and trial judge of Farr is meaningless rhetoric. Judge Older was not a witness nor a prosecutor, nor was Farr on trial for violating the court's Publicity Order. Except for petitioner's claim of constitutional privilege, the circumstances herein were no different than in any other case where a witness refuses to answer questions. As the California Court of Appeal so correctly observed, the trial court has an obligation to initiate investigations into alleged violations of its orders. The publicity order was not issued by Judge Older in the first instance, but if it had been, due process did not require that he abdicate to another judge his obligation to investigate violations of that order.

CONCLUSION

The opinion of the California Court of Appeal does not indicate any insensitivity to freedom of press. Rather, it indicates a sensitivity and awareness of the paramount and compelling obligation of the trial court to preserve the criminal defendant's right to a fair trial. There exists absolutely no evidence of judicial overreaching or harassment. Indeed, judicial inaction would have been a regrettable disregard of constitutional responsibilities.

Although the assertions of amici that the petitioner acted throughout as an ethical reporter are clearly contrary to the established facts, the trial court's action did not seek to punish the petitioner. The trial court, of course, was disturbed that three attorneys would flagrantly violate the court's publicity order, but at all times the identity of those individuals was the single goal of its inquiry. It is not the rules of evidence or the issuance of orders in the abstract that are of concern to our courts but the application in principle and in fact of the constitutional guarantee of a fair trial. The guarantee of a fair criminal trial is as much the cornerstone of a free and democratic society as is the guarantee of freedom of speech and press. Such a society requires the vigorous enforcement of both rights and the logical and well-considered reconciliation of these rights when they come into apparent conflict.

Your honorable Court might well have had the circumstances of the instant case in mind when the following comment was made, "Neither prosecutors, counsel for defense, the accused, witness, court staff, nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (*Sheppard v. Maxwell,* 384 U.S. 333, 16 L. E. 2d 600 at page 620)

To adopt the position urged by the petitioner and the amici would be to open the door to potential abuses

so obvious that they need no recitation here. This case provides the example. The opinion of the Court of Appeal, limited as it is to the compelling facts of the instant case, cannot be said to constitute an impermissible interference with legitimate news gathering activities.

The respondent respectfully requests that petition for writ of certiorari be denied.

Respectfully submitted,

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